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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1947

No. 399

NATIONAL PRESSURE COOKER COMPANY,
a corporation,

Petitioner,

vs.

ALUMINUM GOODS MANUFACTURING COMPANY,
a corporation,

Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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THE TWENTIETH CENTURY PRESS, INC., CHICAGO

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I

Respondent's Brief (pp. 3 and 4) argues that there is no conflict between the decision below as to the requirement of a "new result" and decisions of this Court, and further that the question is moot because not necessary to the decision below. At no place in its brief does respondent refer to the specific question presented (Petition p. 4). Respondent has not denied that the Circuit Court of Appeals below has required that there not only be a "new result" in the patented cooking utensil, itself, but also a "new result" in the unpatented food.

The statement by the respondent (Br. p. 4) that the Court below found the Wittenberg patent "anticipated by the prior art" and consequently that the question of a "new result" is a moot question, is in error. The Court below held claims 1, 2 and 6 "invalid for lack of invention" (R. p. 372). In reaching this decision, the Court necessarily considered of significance whether or not a "new result" was produced. It is to be observed that in summarizing the principles of law, the Court stated (R. p. 369):

> "an improvement or advantage resulting from a combination of old elements, *especially where no new result is obtained,* is ordinarily credited to mechanical skill rather than invention." (Emphasis supplied).

II

With respect to the second question presented, the respondent argues (Br. pp. 5-12) that the question of invention may be a question of law and that the Circuit Court of Appeals did not find as to facts any differently from the Trial Court. The opinion (R. p. 366) shows that the Circuit Court of Appeals specifically rejected a fact finding of the Trial Court.

In so far as the applicability of Rule 52(a) of the Rules of Civil Procedure is concerned, it makes no difference, as respondent suggests (Br. p. 6), whether the facts found by the Trial Court be details or ultimate facts. The notes of the Advisory Committee as to Rule 52(a) state as to the specific sentence of the rule which is here involved:

> "It is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony."

III.

Respondent's Brief (pp. 12-15) argues as to the third question presented that the Circuit Court of Appeals did not rely upon the file wrapper. At p. 14 of its brief, respondent states that the opinion of the Circuit Court of Appeals "is based solely" upon consideration of the prior art.

Four pages of the nine-page opinion of the Court below deal with the file wrapper. The Circuit Court of Appeals did "consider" the file wrapper. The Court also called attention to the "confusion in the authorities" which is, in fact, an irreconcilable conflict which has never been passed upon by this Court. This conflict is not denied by respondent.

The Circuit Court of Appeals in the instant case relied upon its own previous decision in *Electro-line Co.* v. *Reliable Electric Co.*, 101 F. (2d) 380, a decision not reviewed by this Court. In the *Electro-line Case* it was stated that in an infringement suit the Court had "no right" to rule differently from the ruling of the Patent Office. This is in plain conflict with the decisions of the Circuit Courts of Appeal of the Second and Sixth Circuits, as pointed out in petitioner's original brief.

At pp. 1 and 2 of its brief, the respondent calls attention to decisions which show that this Court does not grant certiorari in "an ordinary case." The question, as to the effect to be given to an amendment made in the course of the prosecution of a patent application in an infringement suit after the patent is issued, is a question which has never been passed upon by this Court. The decision below and the previous decision of the same Court relied upon are in clear conflict with decisions of other Circuit Courts of Appeal. The question is one of importance to litigants

and potential litigants in patent infringement cases. It is a question of importance to any applicant for a patent. It is respectfully submitted that it is a question of public importance in which there is "a real and embarrassing conflict of opinion" between the Circuit Courts of Appeal, and which should be decided by this Court.

Respectfully submitted,

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